No. 12,158

IN THE

# United States Court of Appeals

## For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

*Appellants,*

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,

*Appellees.*

# Supplemental Memorandum on Behalf of Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence M. Rasor, Stauffer Chemical Company, and West End Chemical Company in Response to Appellants' Reply Brief.


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Appellants' reply brief makes erroneous statements of fact and cites cases not mentioned in their opening brief although available at the time. The purpose of this supplemental memo-

randum is to comment on some of these matters and to cite one case not yet available when our brief was filed.

### 1. The Burnham Decision

To avoid the controlling effect of this Court's decision in the *Burnham* case, appellants assert repeatedly (e.g., reply brief, 2, 4, 23) that the *Burnham* case was decided after a jury trial and that here there was a summary judgment. The fact is that in the *Burnham* case the jury was discharged without a verdict and the judgment was affirmed by this Court on the ground that it was a proper summary judgment. The issue here is exactly what it was in the *Burnham* case, i.e., was there any genuine issue of fact.

### 2. Sham Allegations Create No Issue

Appellants (reply brief, 3) in effect admit that the facts shown by defendants' affidavits below are uncontradicted. Their primary if not sole contention is that allegations of a complaint must be taken as true on a motion for summary judgment. There are two answers: (1) There are no sufficient allegations in the complaint (see our brief, e.g., pp. 35-40, 53-55, 59-64, 66-67, 70-76). (2) It is well settled that the allegations of a complaint do not determine a motion for summary judgment, and allegations shown to be sham by affidavit cannot defeat the motion. *Christianson v. Gaines,* 174 F.2d 534, 536 (C.A. D.C., decided April 1949, reported July 1949 after our brief was printed) quotes and approves this Court's decision to that effect in *Lindsey v. Leavy,* 149 F.2d 899. The *Christianson* case is of interest because it is the latest decision on the subject from the court whose decision in *Farrall v. District of Columbia Amateur Athletic Union,* 153 F.2d 647, is the basis of the cases which appellants misconstrue and, so misconstruing, rely upon for their

erroneous contention that allegations of a complaint are unassailable on a motion for summary judgment.

Appellants' reply brief (p. 4) asserts that our brief did not question this contention. On the contrary, we showed it to be unsound (our brief, pp. 41, 42).

### 3. Continuing Conspiracy Theory

Despite this Court's decision in the *Burnham* case, appellants continue to press the "continuing conspiracy" theory to toll the statute of limitations. *Nye & Nissen v. United States,* 168 F.2d 846, newly cited in the reply brief (p. 11), and the other cases cited again are all criminal cases. *Urie v. Thompson,* 337 U.S. 163 (cited reply brief, p. 10), involved the very special problem of the time of accrual of a cause of action for the occupational disease of silicosis. Its utter irrelevancy is shown by the fact that less than 1½ months before it was decided the Supreme Court denied appellants' petition for rehearing in the *Burnham* case, wherein this Court held the continuing conspiracy theory inapplicable to a civil suit for damages under the antitrust laws.

### 4. Availability of Defense of Statute of Limitations on Motion

Appellants' reply brief (p. 22) cites four cases not cited in their opening brief as alleged support for their contention that the statute of limitations cannot be raised on a motion to dismiss or for summary judgment. One of them, *Zimmerman v. Poindexter,* 78 F. Supp. 420, does not purport to hold so. The other three are from the same district court (E.D. Pa.), two of them by the same judge, and apply the old common law rule which prevails in Pennsylvania and which was long ago replaced in California by the equity rule which has been adopted by the Federal Rules of Civil Procedure (see our brief, pp. 35-36).

These cases are poor law and inconsistent with the decisions of this Court in the *Burnham* case and *Gifford v. Travelers Protective Assn.,* 153 F.2d 209.

### 5. "As to the Releases"

Under this heading appellants' reply brief (p. 9) merely makes the similar contention that the defense of release cannot be raised until answer. This is not the law (see our brief, pp. 52, 53, and see supra). The contention would apply equally well to the defense of the statute of frauds. Yet only recently it has been held that such a defense may be raised on a motion to dismiss. *Keene v. Leventhal,* 165 F.2d 815, 821 (1 Cir.).

Later in the reply brief (p. 13) appellants cite *Vines v. General Outdoor Advertising Co.,* 171 F.2d 487 (2 Cir.), as supposed support for the contention that a release does not cover claims not known at the time it was given. In the first place, the claim of ignorance is pure sham (see our brief, pp. 55, 57). In the second place, the *Vines* case does not support appellants but supports appellees. It did not turn on the releasor's alleged ignorance but on the breadth of construction to be given words of general import when followed or preceded by words relating to specific claims. The court applied a New York rule (the case arising in New York) that where general words are followed or preceded by specific claims, they are limited thereto, unless a contrary intention appears. The court noted that if the releases had contained only the general words, plaintiffs' ignorance would have been irrelevant. The court further said that "In releases, as elsewhere, the intent of the parties is to be gathered from the instrument as a whole," citing *Murphy v. City of New York,* 83 N.E. 39, 190 N.Y. 413, where a release containing general words was given the broadest construction although followed by specific claims.

Now here the 1934 releases specified no particular claims but were cast entirely in broad general terms (quoted, our brief, p. 52). Thus, even under the New York rule these releases bind appellants regardless of alleged ignorance.

In the 1942 release the general and comprehensive words are followed by some specification, but this descent to particulars is prefaced by the words "without limiting the generality of the foregoing release" (quoted, our brief, p. 57).

Further, both the 1934 releases and the 1942 releases, unlike the Vines release which did not specify "unknown claims," conclude with a paragraph (quoted, our brief, p. 54) stating that "It is the specific intent and purpose hereof to release any and all claims * * * of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not * * * and [whether] intentionally or unintentionally omitted from this release." The intention of a release is to be gathered from the document itself (see our brief, p. 55), and the intention of these releases is unmistakable.

### 6. Attempt to Go Behind Final Judgments

In attempting to avoid the fact that they seek to go behind final judicial decrees and judgments, appellants' reply brief asserts (p. 7) that the judgments "came as the result of the settlement of controversies" and "so do not possess the character sought to be given them by counsel."

A stipulated judgment is as conclusive as a judgment rendered after trial. *City of Oakland v. Oakland Water-Front Co.,* 162 Cal. 675, 686; *Nashville, etc. Railway Co. v. United States,* 113 U.S. 261; *Standard Oil Co. v. Clark, Attorney General,* 163 F.2d 917, 930 (2 Cir.), cer. den. 333 U.S. 873.

Moreover, the judgments were not the result of stipulation but were entered after thorough contest. The subsequent settlement merely led to the dismissal of appeals (see our brief, pp. 59-61).

Dismissal of an appeal leaves a judgment as if no appeal had ever been taken. 4 *C.J.S.* 2007, Sec. 1386.

### 7. Failure of Allegations of Damage from Alleged Acts of 1942

Denying the elementary rule that a complaint for treble damages must allege facts from which damages are logically and legally inferable, as shown by the numerous treble damage cases cited in our brief, pp. 71, 72, appellants' reply brief (pp. 13, 14) cites cases which do no more than to say that when the allegations of a complaint show logically the fact of damage, general allegations as to amount may be sufficient. But here the complaint fails as to the fact of damages. In *C. E. Stevens Co. v. Foster & Kleiser Co.,* 311 U.S. 255, referred to by appellants, it was not questioned that the complaint alleged facts from which damages logically and legally flowed, but it was argued that the acts so causing damage were in intrastate commerce. Whether this was so was the crux of that case.

Appellants (pp. 14-16) comment on allegations of events culminating in 1934, but this is irrelevant, for the issue here relates to events of 1942. As to that, appellants' discussion is silent. Elsewhere (reply brief, p. 10) appellants assert that the property conveyed in 1942 was of great value, far exceeding the amount received. This simply substitutes assertion for the record, which belies it.

### 8. Re Rasor's Estate

Appellants contend (reply brief, p. 18) that Rasor's estate may not present the point urged by us (our brief, p. 78) because it was not passed on by the court below. That point was one of the grounds presented below in support of the motion to dismiss. The motion was granted. A judgment must be affirmed, if sustainable on any ground, regardless of the ground on which the lower court bases its action, particularly where

the ground of affirmance was asserted below. *Kithcart v. Metropolitan Life Ins. Co.,* 150 F.2d 997, 1000 (8 Cir.), cer. den. 326 U.S. 777; *American Tube Works v. Bridgewater Iron Co.,* 132 Fed. 16 (1 Cir.); *Montgomery v. Gilbert,* 77 F.2d 39 (9 Cir.). Courts of appeal review orders made, not reasons assigned.

On the merits of the point,. appellants concede that survivability of a claim against Rasor's estate after his death depends on whether Rasor secured a benefit. Appellants argue that this is a question of proof. But what one must prove he must plead. *Garrett v. Louisville & Nashville R.R. Co.,* 235 U.S. 308, 312; *Alpine Forwarding Co. v. Pennsylvania R. Co.,* 60 F.2d 734 (2 Cir.) (per Learned Hand, J.), cer. den. 287 U.S. 647. Where a cause of action is based on an exception to a general rule (here non-survivability of tort claims), the complaint must allege facts to bring the case within the exception. *United States v. Korner,* 56 F. Supp. 242.

The failure to allege benefit to Rasor or to his estate was deliberate, for appellants persisted in the omission after the defect was pointed out and despite subsequent amendment of the complaint. The heirs were entitled to have the estate closed, in the absence of proper allegations.

### 9. Re Motion to Set Aside Judgment to Permit Third Amendment of Complaint

Appellants' brief (p. 17) cites *Markert v. Swift & Co.,* 173 F.2d 517. In that case, (1) unlike here, there had been no previous amendment to the complaint, and (2) also unlike here, the motion to amend was accompanied by a "proffered amended complaint" (p. 519, 1st col., 1st para.), which the court was able to review (p. 520, 2nd col.).

## 10. Miscellaneous

Appellants' reply brief (p. 6) attacks our statement that they received over $600,000 under the 1934 releases. The facts, as shown in Appendix 1 to our brief, are that appellees paid appellants $150,000 cash,* gave a satisfaction of judgment against Suckow for over $56,000, obtained a release for appellants of a claim of Gembo for $140,000, and released the Suckow company from a claim for over $310,000. This claim was for the taking of 16,291.5 tons of ore. It had already been adjudged and decreed that the ore belonged to appellee, that Suckow company had wrongfully taken the ore, that it should account, and that it should account at the rate of $21.89 per ton (R. 55). This would bring the claim to over $350,000. These items total over $700,000. In addition, appellees released appellants of all claims for damages and profits arising from patent infringement, which had already been established by decree, and gave other considerations not included in the above calculation. The figure of $600,000 was most conservative.

Appellants say (reply brief, p. 6) that property was conveyed to appellees, as part of the 1934 settlement, containing borax worth millions. The assertion is irrelevant since the essential point is that the 1934 releases involved passage of a very large consideration. Moreover the assertion is unfounded as the record shows, for the complaint alleges that the appellants' borate bearing land had all been conveyed in 1929 to the Suckow company (see our brief, p. 6), had passed into the hand of the trustee in bankruptcy and was leased on a royalty basis; it was not sold or conveyed. The miscellaneous plots conveyed were not alleged to contain borax.

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*Appellants' reply brief (p. 10), mistakenly ascribes to our brief a statement that $350,000 cash was paid in 1934. That sum was paid in 1942.

It is respectfully submitted that the judgment should be affirmed.

Dated: San Francisco, California, October 11, 1949.

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